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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DEREK MICHAEL DUNN, Defendant and Appellant.	F041011 (Super. Ct. No. 1035070) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. David G. Vander Wall, Judge.

Tutti Hacking, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Matthew L. Cate and Laura Wetzel Simpton, Deputy Attorneys General, for Plaintiff and Respondent.

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PROCEDURAL HISTORY

By information, Derek Michael Dunn (defendant) was charged with one count of making criminal threats against his mother and/or her husband (Pen. Code, § 422[1]). It was further alleged that defendant had served a prior prison term (§ 667.5, subd. (b)). Defendant pled not guilty and denied the allegation.

A jury found defendant guilty, and defendant subsequently admitted the allegation. Defendant was sentenced to three years—the middle term of two years for the conviction for making criminal threats and one year for the prior prison term enhancement.

FACTUAL HISTORY

In 1990, when defendant was 17 years old, he began threatening to kill his mother. Although defendant never physically hurt anyone, he was often belligerent and appeared "close to being physical[.]"

When defendant turned 18 years old, his parents asked him to move out. Defendant did not leave willingly and returned many times, seeking a place to stay. For instance, on February 27, 1994, defendant laid down on a sleeping bag on his parents' property and refused to leave. Defendant demanded that his parents buy him a truck. They had previously given him a truck on the condition he make the monthly payments but took the vehicle back when he failed to do so. Sheriff's deputies ultimately removed defendant from the property. Defendant told a deputy that "he would come back after he got out of jail."

On March 5, 1994, defendant returned to his parents' property and asked to be fed. Since defendant refused to work or care for himself, his parents turned down his request. A sheriff's deputy again removed defendant from his parents' property.

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[1]All statutory references are to the Penal Code unless otherwise indicated.

In July 1994, defendant's father passed away. Fearful of defendant, defendant's mother applied for and received a restraining order in August 1994. The restraining order barred defendant from contacting his mother or coming onto her property. Nonetheless, between August and November 1994, defendant contacted his mother on numerous occasions. He left threatening, profane telephone messages demanding that she buy him a truck, give him money, and provide him a place to live. Defendant threatened his mother that "[i]f he wasn't going to live in dad's house, then [she] wasn't either."

In 1995, defendant's mother remarried. Her new husband, Bob Shook, wanted to help defendant. He bought defendant a $10,000 pickup truck and secured an apartment for him, agreeing to temporarily help pay the rent. Shook often visited defendant to see how he was doing. During these visits, defendant referred to his mother as "'[t]hat bitch.'" Shook gave defendant $75 every week to assist him, but defendant repeatedly refused to work. When Shook refused to give defendant more money, defendant reacted by threatening to "burn the house down over [his mother and Shook's] heads …." Defendant was soon evicted from his apartment, and his truck "was stolen to a drug person in town." Later, defendant continued to demand money and became very angry when his mother and Shook refused. He threatened to kill his mother and added that her "days were numbered" and that she had "crossed the line."

Concerned for her safety, defendant's mother stayed home with the doors locked and the drapes drawn, but the threats continued. Between 1993 and 1997, defendant's mother estimated that there were 20 incidents with her son where she called the police. On May 26, 1997, defendant spoke to his mother over the telephone and demanded money and another truck. When defendant's mother refused, defendant responded that "he was coming out with a pistol, and he was going to kill [her] …." Shortly after this last conversation, defendant moved to another area of the state for several years. During this time, defendant's mother and Shook moved to another home and asked family

members not to disclose the location to defendant. Defendant's mother did not speak to defendant but continued to send him Christmas and birthday gifts.

On April 20, 2001, defendant's mother called defendant after receiving a message that he was trying to reach her. Defendant demanded that his mother buy him a Chevy S-10 truck with four-wheel drive and a king cab. Becoming angry when his mother refused, defendant threatened that their "paths are going to cross some day" and his mother "had crossed the line."

On December 24, 2001, defendant's mother next spoke to defendant over the telephone. He asked her where she was living, but she refused to tell him. Defendant concluded the conversation by telling his mother "to stay out of his F'ing life" and then hung up. On January 4, 2002, defendant's mother learned defendant had returned to the area. She testified that she felt uneasy and fearful, concerned that she had to "watch [her] back." Unbeknownst to defendant's mother, her youngest son had sent a Christmas card to defendant with his cell phone number.

On January 8, 2002, defendant called his brother's cell phone. After some small talk, defendant stated that his mother and Shook owed him an apartment and a truck. Defendant called his mother a "fucking cunt" and a "bitch" and stated that if his mother and Shook knew what was best for them, they were going to get him an apartment and a vehicle. Defendant became angry during the conversation and threatened, "'I am going to kill that fucking bitch cunt[,]'" and "'I am going to burn the house down and kill them[.]'" He added that his mother and Shook's "days were numbered[.]" Defendant unsuccessfully attempted to obtain his brother's address. He accused him of being brainwashed and hung up the phone.

Defendant's brother was concerned about the comments made by defendant and told his mother. Defendant's mother was again concerned for her safety. Shaking and teary-eyed, she informed Shook of defendant's threats and contacted the police. Shook also feared for his safety.

DISCUSSION

I. Admission of the 1994 audiotape

Defendant first argues that the trial court committed reversible error in admitting a 1994 audiotape and its transcript because 1) the prejudicial effect of the evidence outweighed any probative value under Evidence Code section 352, or 2) the evidence was not timely discovered. We review rulings of the trial court regarding the admissibility of evidence under the familiar abuse of discretion standard. (See *People v. Alvarez* (1996) 14 Cal.4th 155, 201; *People v. Cudjo* (1993) 6 Cal.4th 585, 609 [trial court's ruling on Evid. Code § 352 is reviewed for abuse of discretion].)

A. 1994 audiotape

The court admitted the following audiotape messages left by defendant over several weeks in October and November 1994 on his mother's answering machine:

> " … GET YOUR ASS OVER HERE. PICK ME THE FUCK UP AND LET'S GO GET A GODDDAMN CAR. YOU'VE GOT TO BE THE BIGGEST BITCH ON THE FUCKING EARTH. [¶] … [¶]
>
> " … PICK UP YOUR PHONE. THERE AIN'T NO FUCKING REASON.… YOU KEEPIN' ME SO MOTHER FUCKIN' PISSED BITCH. PICK UP THIS FUCKING PHONE. YOU'RE BUYING ME A CAR OR I'M GOING TO TAKE CARE OF YOUR ASS. PICK UP THE FUCKING PHONE. YOU BETTER GET YOUR ASS OVER HERE AND PICK ME UP. YOU THINK I'M JOKING WITH YOUR FUCKING ASS. WAIT TIL I SEE IT. [¶] … [¶]
>
> " … MOM, PICK UP YOUR PHONE. YOU GET OVER HERE AND PICK ME UP (BEEP) RIGHT NOW AND LET'S GO GET ME A MOTHER FUCKIN' CAR. IF I GET OUT THERE I'M GOING TO RIP YOUR FUCKING HEAD OFF. [¶] … [¶]
>
> " … LISTEN HERE YOU MOTHER FUCKIN' CUNT. JUST WAIT. [¶] … [¶]
>
> " … MOM. COME PICK ME UP, WE'RE GOING TO BUY A CAR. [¶] … [¶]

" … MOM. COME PICK ME UP. WE'RE GOING TO GET A NEW BLAZER. TIME YOU WAKE UP. I CAN'T STAND IT NO LONGER. GET OVER HERE AND PICK ME UP. [¶] … [¶]

" … MOM. COME PICK ME UP. [¶] … [¶]

" … MOM. COME PICK ME UP. TAKE ME BACK HOME. PICK UP THE PHONE. I NEED YOU TO COME AND PICK ME UP. PICK UP THE PHONE. [¶] … [¶]

" … YOU ARE SO FUCKIN' COLD BLOODED THAT YOU [CANNOT] PICK UP THE PHONE FOR ME. I'D APPRECIATE IT IF YOU WOULD PICK UP THE PHONE. ANYONE WHO'S THERE. [¶] … [¶]

" … WOULD YOU PICK UP YOUR PHONE PLEASE. SOMEONE THERE PICK UP THE PHONE. I'VE HAD IT WITH BEING TREATED LIKE THIS. I THINK ONE OF YOU GUYS SHOULD PICK UP THIS PHONE. [¶] … [¶]

" … MOM. PICK UP THIS RECORDER. YOU NEED TO COME AND PICK ME UP. THIS IS BULLSHIT. PICK UP THE PHONE. [¶] … [¶]

" … PICK UP THE GODDAMN PHONE. YOU'RE GOING TO FUCKIN' REGRET IT. [¶] … [¶]

" … MOM. PICK UP THIS PHONE. YOU ARE PISSING ME OFF TO THE FUCKING HILL. PICK UP THE PHONE. YOU ARE COMING AND PICKIN' ME UP. PICK UP THIS MOTHER FUCKING PHONE. ANY CLEARER? [¶] … [¶]

" … PICK UP YOUR PHONE. [¶] … [¶]

" … PICK UP THE PHONE. [¶] … [¶]

" … YOU HAD BEST COME PICK ME UP AND GO TO A CAR LOT. [¶] … [¶]

" … YOU NEED TO COME AND GET ME A CAR. PICK UP YOUR PHONE. [¶] … [¶]

" … MOM. YOU HAD BETTER PICK UP THIS PHONE. COLD BLOODED BITCH. [¶] … [¶]

" … SOMEONE IN THE HOUSE PICK UP THE GODDAMN PHONE. [¶] … [¶]

" … MOM PICK UP THIS PHONE. SOMEONE IN THE HOUSE BETTER PICK UP THE PHONE. I GOT THAT (UNINTELLIGIBLE) AND I'M NOT FUCKING WITH YOU."

B. Evidence Code section 352

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Defendant was charged with making criminal threats in violation of section 422. The People were required to prove that: 1) defendant willfully threatened to commit a crime which if committed would result in death or great bodily injury to another person; 2) defendant made the threat with the specific intent that the statement be taken as a threat; 3) the threat was contained in a verbal or written statement; 4) the threatening statement on its face, and under the circumstances in which it was made, was so unequivocal, unconditional, immediate, and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution of the threat; and 5) the threatening statement caused the person threatened reasonably to be in sustained fear for his or her own safety. (See CALJIC No. 9.94; *People v. Butler* (2000) 85 Cal.App.4th 745, 753.)

The messages defendant left for his mother on the audiotape were highly probative on the issue of the reaction of defendant's mother to her son's later threats, as well as the reasonableness of her reaction—i.e., that she was in sustained fear for her safety. (See *People v. Butler*, *supra*, 85 Cal.App.4th at p. 754 [parties' history can be considered as one of relevant surrounding circumstances when evaluating threat under § 422].) In addition, the nature of defendant's previous threats was relevant to defendant's specific intent when making the threats at issue in this case—that he intended the later threats to be taken as such.

In any event, we find the prejudicial effect of admission of the audiotape to be minimal given the court's jury instruction that it may not convict defendant for the current offense based on past threats, including those on the audiotape. The jury was also repeatedly reminded, both when the audiotape was admitted and during closing argument, of the many years that had passed between the answering machine messages and the current offense.

For all these reasons, we find no abuse of discretion in the admission of the 1994 audiotape and its transcript.

C. Timeliness of discovery

Defendant also contends that the prosecution belatedly provided discovery of the audiotape, and its admission into evidence therefore violated the discovery statutes and his constitutional due process rights.

During defendant's preliminary hearing on March 8, 2002, defendant's mother testified that she "had an answering machine and [defendant] would call and leave messages on the answering machine that was entered into court one other time when we were in court as evidence." Defendant's trial commenced two months later on May 20, 2002. At some point during the first day of trial, the deputy district attorney notified defense counsel and the court that he had a copy of the 1994 audiotape recording of defendant's threats to his mother and would ask that it be admitted as evidence. The following day, defense counsel objected to admission of the audiotape on several grounds, including late discovery. The trial court responded: "On the issue of discovery, it's my understanding from what [the deputy district attorney] said yesterday, it was indicated in the report somewhere in his prelim. [¶] … Certainly the defendant had a right to request to hear it." Defendant advised the court that the audiotape had been played eight years ago in another case and that he had a couple of cases since then. The court replied: "[N]ow that I have heard that, the Public Defender's Office had the tape initially anyway, so presumably they have a record on this defendant."

As explained in *People v. Bohannon* (2000) 82 Cal.App.4th 798, 804-805:

> "The obligation of the People to disclose information to the defense is dependent upon whether that obligation has a constitutional or statutory basis.… [T]he prosecution has a sua sponte obligation, pursuant to the due process clause of the United States Constitution, to disclose to the defense information within its custody or control which is material to, and exculpatory of, the defendant. [Citations.] This constitutional duty is independent of, and to be differentiated from, the statutory duty of the prosecution to disclose information to the defense. [Citations.] The California statutory scheme … requires that the prosecution disclose specified information to the defense, as set out in section 1054.1, including, among other things, [statements of the defendant].… Violation of the California statute may result in imposition of sanctions pursuant to section 1054.5."

There is no constitutional violation as defendants' statements on the audiotape are clearly inculpatory, rather than exculpatory. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 952 [due process does not require particular sanction for belatedly disclosing inculpatory evidence to defendant].) With respect to the alleged statutory violation, section 1054.7 requires the disclosure to be made at least 30 days prior to trial or, if the information becomes known to a party within 30 days of trial, immediately after the party learns of it. On this record, there is no evidence that the prosecution failed to timely disclose the audiotape. We therefore find no error. (See *People v. Garcia* (1987) 195 Cal.App.3d 191, 198 [criminal defendant's burden on appeal to affirmatively demonstrate error].)

II. CALJIC No. 17.01

Defendant next maintains that the court committed reversible error in instructing the jury with CALJIC No. 17.01 because there was only one "act." The People claim defendant waived the error by failing to object to the instruction. Assuming without deciding that the issue has not been waived, defendant's argument lacks merit.

> "The proper test for judging the adequacy of instructions is to decide whether the trial court 'fully and fairly instructed on the applicable law ….' [Citation.] '"In determining whether error has been committed in giving or

not giving jury instructions, we must consider the instructions as a whole … [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. [Citation.]"' [Citation.] 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111-1112.)

The jury was instructed with a modified version of CALJIC No. 17.01 as follows:

> "The defendant is accused of having committed the crime of threatening to commit a crime. The prosecution has introduced evidence for the purpose of showing that there is more than one act and more than [one] victim upon which a conviction may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that he committed any one or more of such acts as to any one victim. However, in order to return a verdict of guilty to the crime, all jurors must agree that he committed the same act or acts and agree as to the victim(s). It is not necessary that the particular act agreed upon be stated in your verdict."

Defendant was charged with one count of making criminal threats against his mother and/or Shook. The People set forth several threats made by defendant during his January 8, 2002, conversation with his brother. Specifically, defendant threatened, "'I am going to kill that fucking bitch cunt[,]'" and "'I am going to burn the house down and kill them[.]'" Defendant added that his mother and Shook's "days were numbered." During closing argument, the People referred to these separate threats when discussing the evidence supporting the charge. The modified version of CALJIC No. 17.01 properly advised the jury that it must unanimously agree upon the specific threatening statement and the specific victim.

Defendant's claim that the instruction improperly allowed the jury to convict him based on the threats in the 1994 audiotape is unreasonable in light of the other jury instructions, particularly the following:

> "The evidence received of prior conduct by the Defendant, including the tape, may only be considered by you on the issues of specific intent- element #1 of [s]ection 422 … and sustained fear- element #5 of [s]ection 422 … and not for any other purpose.

> "You may not convict the Defendant of the crime charged just because he may have made these statements in the past, but rather you must find beyond a reasonable doubt an actual threat was made on the occasion charged and that it was within the definition of … [s]ection 422 given to you."

We conclude the court did not err in instructing the jury with the modified version of CALJIC No. 17.01.

III. Sufficiency of the evidence

Finally, defendant contends there is insufficient evidence that the victims were reasonably in fear for their lives as required by section 422. Specifically, he argues there is insufficient evidence that his threat was unequivocal and immediate or that it caused his mother and Shook to be reasonably in sustained fear for their safety. We disagree.

This court's role in reviewing evidence to determine whether it is sufficient to sustain a conviction is "a limited one." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

> "The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Jones* (1990) 51 Cal.3d 294, 314; accord *People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Under section 422, a person is guilty of making criminal threats if he "willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, *on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat*, *and thereby causes that person reasonably to be in sustained fear for his or her own safety* …." (Italics added.)

Regarding the immediacy of the threat being executed, "'[t]he use of the word "so" indicates that unequivocality, unconditionality, immediacy and specificity are not absolutely mandated, but must be sufficiently present in the threat and surrounding circumstances to convey gravity of purpose and immediate prospect of execution to the victim.' [Citation.]" (*People v. Bolin*, *supra*, 18 Cal.4th at p. 340.) The sustained fear must be both actual and reasonable under the circumstances. (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1139-1140.)

Here, we find defendant's January 8, 2002, statements, on their face, to be unequivocal, unconditional and immediate. (See *People v. Butler*, *supra*, 85 Cal.App.4th at p. 752 [threat not insufficient simply because it does not communicate a time or precise manner of execution].) Our conclusion is further supported by the circumstances surrounding the threats. At the time the statements were made, defendant had recently traveled back to the area where his mother and Shook resided. In the same conversation, he requested his family's address and, when this proved unsuccessful, claimed to already know the town in which they resided.

For similar reasons, we find sufficient evidence to support the finding that defendant's mother and Shook reasonably feared for their safety. Both testified concerning their actual fear that defendant would harm them. And, given the above, their sustained fear was imminently reasonable.

DISPOSITION

The judgment is affirmed.

_____
Wiseman, J.

WE CONCUR:

_____
Buckley, Acting P.J.

_____
Levy, J.